IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 972 of 1997,

SPECIAL CRIMINAL APPLICATION No 1272 of 1997,

and

SPECIAL CRIMINAL APPLICATION NO. 1273 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE M.S.PARIKH and

MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

[Circulate to all the Sessions Courts, Courts of Magistrate & Jail Authorities]

OMPRAKASH TEKCHAND BATRA (PUNJABI)

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 972 of 1997

MR JAYESH A DAVE for Petitioners

MR.D.N.PATEL, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

2. Special Criminal ApplicationNo 1272 of 1997
MR TS NANAVATI for Petitioners
MR.D.N.PATEL, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

3. Special Criminal Application No. 1273 of 1997
MR TS NANAVATI for petitioners
MR D.N.PATEL, ADDL.PUBLIC PROSECUTOR for Respondent No.1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE M.S.PARIKH and
MR.JUSTICE A.L.DAVE
Date of decision: 14/08/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

These matters have been placed before this Full Bench, with a view to consider whether trial Court can issue directions on the accused persons who are acquitted by it to furnish bail bonds which would remain in force for a year from the date of acquittal with a view to ensure their presence, in the High Court, should an acquittal appeal be filed against such acquittal orders.

2. In Special Criminal Application No. 972/97, the petitioners were acquitted by judgement and order dated 29th April, 1997 of the Additional Sessions Judge, Kheda at Nadiad in Sessions Case No. 157/96 for the offences under Sections 302 and 498A read with Section 114 of the Indian Penal Code, but, by that very order the trial Court directed that with a view to ensure the presence of the petitioners, who were original accused Nos. 2 and 4 and were acquitted, they would be released on bail on their furnishing surety in the sum of Rs. 2,000/-. A further condition was imposed that these petitioners will not, without the prior permission of the Court, leave the limits of Kheda District. They were also directed to furnish their addresses to the Nadiad Town Police Station.

3. In Special Criminal Application No. 1272/97, the petitioner was acquitted by the Additional Sessions Judge, Surat on 4.12.1996 in Sessions Case No. 90/95 for the offences under Sections 394 and 397 of the IPC and Section 135 of The Bombay Police Act, but while acquitting him the trial Court directed that the petitioner should be released only on his furnishing surety in the sum of Rs. 2,000/-. It was also directed that any change in the residential address of the

petitioner should be informed in writing to the Court and to the Udhna Police Station well in time. According to the petitioner, since his condition was of an abject poverty, he could not arrange for a surety for being released on bail and had to remain in custody until 9.6.1997 i.e. for more than six months from the date of his acquittal and it was only when the Sessions Court, due to his inability to furnish bail, released him on personal bond of Rs. 2,000/- that he could secure his liberty.

4. In Special Criminal Application No. 1273 of 1997, the learned Additional Sessions Judge, Surat, by a judgement and order dated 31.1.1997 passed in Sessions Case No. 87/95, acquitted the petitioner for the offences under Section 302 read with Section 114 of the IPC and Section 135 of the B.P Act. The petitioner was accused No.2 in that case and while he was ordered to be acquitted, it was simultaneously directed by the trial Court that he should be released from jail only on his furnishing a surety in the sum of Rs. 3,000/- before the Court. Even in this matter, according to the petitioner, he remained in jail custody for a period of about five to six months.

5. The learned Counsel who have appeared for the petitioners in these matters have contended that these directions have been issued requiring the petitioners to furnish surety before they could be released from jail, despite their acquittal because of the decision of this Court in State of Gujarat Vs. Harish Laxman Solanki, reported in 35(1) GLR p.581, by which the High Court, exercising its inherent powers under Section 482 of the Code of Criminal Procedure, with a view to secure attendance of the accused persons at the appellate stage, issued directions to all the subordinate Courts to cover the appellate period also while taking bail and bail bonds from the accused. It was submitted that the mandate has been issued by the said decision to all the Criminal Courts that while accepting the bail and bail bonds for securing attendance before the officer in-charge of the Police Station or the Court, as provided in Form No.45 in Schedule-II of the Code, all the Criminal Courts shall also take the same covering the appellate as well as revisional stage. In cases where the accused are not on bail, then at the time of either refusing bail application and/or thereafter approximately three months prior to conclusion of the trial, the accused should be informed to be ready with bail and bail bond in the said regard, in the event of necessity at the end of the trial. The High Court directed that while

accepting the bail and bail bonds for securing the attendance before the appellate Court, the same should be taken for a further period of twelve months from the date of order of acquittal. The learned Counsel for the petitioners have strongly urged that the High Court could not have issued such directions to the Criminal Courts in the State in exercise of its inherent jurisdiction under Section 482 of the Criminal Procedure Code. It was submitted that the powers under the provisions of Section 482 of the Code cannot be exercised dehors the provisions of the Code or any other law. It was argued that when a judgement of acquittal was rendered, then by virtue of the provisions of Section 354 (1)(d) of the Code, it was incumbent upon the Court to give a direction that the accused be set at liberty. The submission was that the mandate which is issued to the subordinate Courts by the said judgement runs contrary to the statutory provision of Section 354(1)(d) of the Code and therefore, it could never have been issued in exercise of the inherent powers of the High Court under Section 482 of the Code, which clearly provides that the inherent powers can be exercised for making such orders as may be necessary to give effect to an order under the Court, or to prevent abuse of the process of the Court or otherwise to secure the ends of justice. It was contended that there could arise no question of releasing a person on bail when he is acquitted for. Bail contemplates that otherwise a person would remain in custody. It was further contended that the concept of liberty was wide enough to embrace the liberty of movement without any fetter of conditions which are part of a bail. It was also argued that once an order of acquittal is made, the trial Court became functus officio and by virtue of the provisions of Section 482 of the Code, it cannot be empowered by the High Court to impose any condition that the accused should be released only on his furnishing a surety or executing a bond. It was further argued that the High Court could exercise powers under Section 390 of issuing arrest warrants or granting bail in such cases only when acquittal appeal is presented and it had no jurisdiction to create any power in the trial Court to provide for the interregnum period namely for the period from the date of acquittal till the presentation of the appeal. It was finally contended that any such directions which inhibit the fundamental right of a citizen of movement under Article 19(1)(b) of the Constitution and that of person's right to liberty under Article 21 of the Constitution would be wholly improper and without jurisdiction. It was therefore submitted that the directions issued in H.L. Solanki's case (supra) by this Court which have resulted in to the impugned orders being passed by the

trial Court, are null and void, being violative of the fundamental rights of the petitioners guaranteed by Article 19(1)(d) and 21 of the Constitution.

6. The learned Additional Public Prosecutor came out in strong support of the decision of this Court in H.L. Solanki's case (supra). He contended that there was no provision in the Code to secure appearance of the accused at the time of the hearing of the appeal before the High Court. He therefore argued that in absence of any such provision in the Code, it was open to the High Court to exercise its powers under Section 482 of the Code for securing the presence of the accused persons, who are acquitted, at the hearing of the acquittal appeal. It was argued that this did not amount to imposing any restriction on any of the fundamental rights of such accused persons, but such condition only regulated their fundamental rights. It was submitted that once there was absence of a provision in the Code, there always existed inherent power under Section 482 thereof to remedy the situation in furtherance of the object of the law, which inter-alia was to secure presence of the accused persons before the Court. It was also submitted that the provisions of Section 390 of the Code would operate only when the High Court wanted to issue a warrant of arrest and in cases where the High Court chooses not to issue a warrant of arrest, the question of securing the presence of the accused would still remain. It was contended that the High Court had, by the said judgement, devised its own way of securing the presence of the accused persons who are acquitted, at the hearing of the acquittal, should such appeals be filed. Relying on the provisions of Article 50 of the Constitution, the learned Additional Public Prosecutor contended that the concept of separation of executive from judiciary, contemplated that the judiciary should not take the help of the Police and as far as possible, it should devise its own way of securing the presence of the accused persons who are acquitted, at the hearing of the acquittal appeals and if the High Court has chosen to exercise powers under Section 482 of the Code to ensure such presence of the accused persons, that was a situation in consonance with the provisions of Article 50 of the Constitution and cannot be faulted with. It was submitted that the goal of securing the presence of the accused persons at the hearing of the acquittal appeals can be achieved without taking help of the executive and therefore, such directions are necessary. The learned Additional Public Prosecutor further contended that in view of the directive principles contained in the provisions of Article 39A and Article 51A(i)(j) by which fundamental

duties are imposed on citizens, the directions which have been issued by this Court in Solanki's case (supra) can be upheld and justified. The learned Additional Public Prosecutor finally argued that if this Court feels that continued custody of an accused who is acquitted is not contemplated, then the directions issued by this Court in H.L.Solanki's case (supra) can be suitably modified by requiring the Sessions Courts to take an undertaking or a bond from such accused persons who come to be acquitted.

7. In H.L.Solanki's case (supra), the Court found itself confronted with two questions of public importance "baffling" the Court, one of them being, "whether though there was no express provision in the Criminal Procedure Code, 1973 on the point, this Court would be still justified in directing the subordinate Courts to take bonds and bail bonds from the concerned accused as well as their sureties, by way of security for the purpose of making them available to face not only the investigation and the trial proceedings, but also the appellate one and thereby to take ultimate orders that may be passed against them after their acquittals", and secondly, "whether in cases where the accused is not released on bail pending trial and is ultimately acquitted, he or his sureties should be asked to furnish bail bonds alongwith his permanent residential address before releasing him?" The Court found that the problem of the Police agency not being able to serve notices as well as non-bailable warrants issued in acquittal appeals was a serious problem because until the accused was served, the matters did not become ripe for hearing, which resulted in the piling up of appeals. The Court observed that the Criminal Procedure Code which took enough care to secure attendance of the accused at the stage of investigation and trial by providing for interim bail and bail bonds from the accused and his sureties on the basis of Form No.45 in Schedule-II of the Code, is "unfortunately" silent about the interim period between the order of acquittal and the acquittal appeals. The Court held that such a chronic and pestering disease is required to be immediately remedied and that the same could be done in the following two ways. Firstly, whenever any accused is arrested for the alleged offence and applies for bail, the subordinate Court should see to it that bail bonds from him and his sureties are taken, not only for the limited purpose of securing his presence at the stage of investigation and trial, but the same should also cover the proceedings before the appellate Courts. Secondly, if for whatever reasons, the accused was not released on bail at the time of trial and ultimately is acquitted,

then in that case also before releasing him, he should be asked to furnish the bonds and the sureties to the satisfaction of the Court for the purpose of making him available to take whatever order that may be passed against him by the appellate Court.

As regards Form No.45, the Court held that it was silent on the point of securing the attendance of the accused at the appellate stage and observed that: "it is this silence which this Court desires to express and speaking! And, it is this gap, which this Court intends to bridge across, in the overall interest of justice! The reason is, the alleged legislative silence and the laxity on the point appears to be the root cause of the anxiety and head-ache for the police as well as Court to secure presence of the accused in many cases when appeal is admitted against them." The Court held that by virtue of Section 482 of the Code, it is entirely within the powers of the Court to enunciate some useful directions which may take care of securing the ends of justice. It was observed that: "after administering fullest caution to ourselves, this Court feels that there indeed cannot be any better and greater sparing exercise of the power under Section 482 of the Code than the one we have undertaken in the matter by adding something to the aforesaid Form No. 45 by virtue of which the much needed care is taken to secure the ends of justice by obtaining attendance of the accused at the time of hearing and deciding the appeal filed against him". It was observed that, merely because the legislature was silent on the point regarding securing the presence of the accused at the appellate stage, that cannot be permitted to result "in to a helpless situation where the accused can conveniently exploit an inadvertent slip in not providing for some bail-bonds for securing his attendance at the appellate stage". The Court felt that since the Code was silent on the point of securing attendance of the accused at the appellate stage, as a matter of duty it must exercise its extra-ordinary inherent power under Section 482 of the Code by calling upon all the subordinate Courts to take bail and bail bonds from persons who are acquitted and while accepting such bail and bail bonds for securing attendance at the appellate stage, they should be taken for a further period of twelve months from the date of order of acquittal. It is evident that the directions which have been issued by this Court in H.L.Solanki's case, (supra) have enjoined a duty upon the trial Courts to impose these further conditions that even an acquitted person should furnish a bail-bond before he could be released from jail.

8. We may straightway note that under Section 354 of the Criminal Procedure Code which provides for language and contents of judgement, it is specifically provided in Clause (d) of sub-section (1) that except as otherwise expressly provided by this Court, every judgement referred to in Section 353, if it be a judgement of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty . Therefore, a specific statutory provision requires the Court acquitting the accused to ensure, by giving a direction, that such accused person is set at liberty. After this order of acquittal, the only provision which would fetter the liberty of such accused who is acquitted can be spelt out is from Section 390 of the Code which provides that when an appeal is presented under Section 378 i.e. an appeal from acquittal, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail. Therefore, there is no provision as to how the acquitted accused should be treated during the period between the date of his acquittal and the presentation of the acquittal appeal which empowers the High Court to issue a warrant of his arrest and to grant bail to him. This position should be seen in contra-distinction of a specific provision in Section 389(3), which empowers the trial Court to grant bail on conviction of a person where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years to enable him to obtain orders from the appellate Court under sub-section (1) for his release on bail. Therefore, when the legislature wanted to make any provision for the interregnum period, it has done so as in Section 389(3) when an appeal against the conviction is proposed to be filed by the convict. It follows that the legislature did not intend to provide for any action being taken in respect of an accused who is acquitted during the interregnum period of the date of his acquittal and the presentation of the acquittal appeal, which alone authorises the High Court under Section 390 of the Code to issue warrant of arrest and grant bail to him.

9. The question of releasing a person on bail arises when he is arrested and detained in custody. The Code exhaustively deals with the situations in which a person can be released on bail. At the stage when investigation is pending and when it is not completed within the specified number of days, there is a provision in Section 167(2) of the Code which entitles such accused person to be released on bail if he is prepared to and does furnish

bail and such release on bail would be deemed to be release under the provisions of Chapter XXXIII of the Code. This provision has clear reference to person arrested and detained in custody. The provisions as to bail and bail bond contained in Chapter XXXIII of the Code start from Section 436, which speaks of grant of bail in respect of a person other than a person accused of a non-bailable offence who is arrested or detained. In the same way, Section 437 of the Code, which provides for bail in case of non-bailable offences speaks of a person accused of or suspected of a commission of any non-bailable offence, who is "arrested or detained". Even the provision regarding grant of anticipatory bail under Section 438 provides that such person will be released on bail "in the event of such arrest". The special powers of High Court or the Court of Sessions regarding bail conferred by Section 439 are required to be exercised in respect of any person accused of an offence and in custody as provided therein. Even Section 389(1) which deals with suspension of sentence pending the appeal by the convicted person provides for release on bail "if he is in confinement". From all these provisions it becomes abundantly clear that there would arise no question of grant of bail where the person is not arrested and kept in custody or in confinement. It therefore, follows that when a person is statutorily required to be set at liberty when he is acquitted, there can never be an arrest of such person simultaneously, imposing condition on him that he would be released on bail on his furnishing a surety or executing a bond. It is not within the province of the Court to think of grant of bail once the person is acquitted until a stage of presentation of acquittal appeal arises as contemplated by the provisions of Section 390 of the Code, which empowers the High Court to issue a fresh warrant of arrest and grant bail. The idea underlying bond and bail-bond, as is clear from Sections 436, 437, 438(3) and 441 read with Form No. 45, is to secure attendance of the accused at the investigation or trial.

The provisions of Chapter XXXIII and Sections 389 and 390 of the Code contain a complete and exhaustive statement of the powers of a High Court to grant bail and thereby excludes the existence of any additional inherent powers of a High Court relating to the subject of bail. Section 482 of the Code confers no powers but merely safeguards all existing inherent powers of the High Court necessary to secure the ends of justice, as per the settled legal position right from the decision of Privy Council, A.I.R (32) 1945 Privy Council 94. In Pampapathy and ors. Vs. State of Mysore, reported in AIR 1967 S.C

286, the Supreme Court held that Section 561(A) of the Code (earlier law corresponding to Section 482 of the present Code), no new powers were being conferred on the High Court but it merely recognises and preserves the inherent powers previously possessed by it.

In State of Gujarat Vs. Shankarji Chaturji, reported in 1996 (3) GLR 755, a Division Bench of this Court, dealing with the scope of the powers of the High Court under Section 482 of the Code, held that when there was a clear statutory embargo, the High Court could not cull out powers to permit the parties to compound any of the offences which could not, under the law, be compounded, from the inherent powers. It was held that the inherent powers under Section 482 of the Code did not permit the Court to act arbitrarily as to its jurisdiction and the High Court cannot act according to its whim and caprice while exercising its inherent powers which could be exercised to prevent abuse of the process of any Court, to secure ends of justice and to give effect to any order under the Court.

In State of Punjab Vs. Surinder Kumar, reported in AIR 1992 S.C., 1593, the Hon'ble Supreme Court observed that the Constitution has, by Art. 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matters pending before it", which authority the High Court does not enjoy. It was held that the jurisdiction of the High Court while dealing with a writ petition, was circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to Judge. These observations made in context of the writ jurisdiction of a High Court would apply with much greater force in context of the inherent powers of the High Court under Section 482 of the Code, which can never be exercised dehors the provisions of the Code or for the purpose of creating a jurisdiction which is not there in the trial Court.

10. Bail can be granted by the High Court when the accused is acquitted only when the appeal is presented under Section 378 of the Code against the acquittal and the Court exercises its power of issuing warrant of arrest under Section 390 of the Code which would entail the lodgement of the accused in jail unless he was ordered to be released on bail by the High Court under that provision. The question of release of such person on bail can have no relevance until the acquittal appeal is presented and the warrant of his arrest is issued

under Section 390 of the Code by the High Court directing that the accused be arrested and be brought before the Court for being committed to prison or admit him to bail. The High Court during the issue of an arrest warrant has thus, the power to admit the accused on bail when acquittal appeal is pending. This power is conferred to ensure that an accused against whom acquittal appeal has been filed may not abscond during the pendency of such appeal. The power under Section 390 of the Code can be exercised only after the appeal is presented and not before it. Therefore, when the High Court itself cannot direct arrest of a person acquitted or admit him to bail until appeal is presented against his acquittal, it obviously cannot direct the trial Court to arrest such accused or admit him to bail eventhough he is acquitted by the trial Court. The only contingency in which the convicting Court can grant bail is where the appeal is intended to be filed by the convict as provided by Section 389(3) of the Code. In cases of acquittal, there is no question of an appeal intended to be filed by the accused. There is no such specific provision to provide for bail or for making any such orders of detaining the accused in custody until he furnishes bail at the instance of the State even where acquittal appeal is intended to be filed and rightly so because it would be a grossly unjust and absurd situation where the trial Court acquits the accused and thereby orders him to be set at liberty under Section 354(1) and in the same breath orders such acquitted person to be confined in custody until he furnishes bail for a period of one year as per the directions issued in the present case, which period is even beyond the period of time where his liberty stands statutorily restored and constitutionally guaranteed. The liberty so regained, by virtue of his acquittal is required to be incorporated in the judgement of acquittal under Section 354(1)(d) of the Code and when the accused is found not guilty and acquitted, his liberty can never be fettered by linking with it any shackle of bail or bond unless an occasion arises by virtue of presentation of an acquittal appeal and a warrant of arrest is issued under Section 390 of the Code which would entail his lodgement in prison. The extent of injustice that a direction to insist on the acquitted person to furnish bail for his release, despite the fact that no acquittal appeal is presented under Section 378 and that it may not at all be filed as in the present cases, is evident from the fact that persons though acquitted and statutorily entitled to be set at liberty have to languish in jail though not guilty, for a period of one year which is even longer than the period of limitation prescribed for an acquittal appeal. No amount

of "head-aches" or inconvenience to the functionaries of the system that may be caused in serving notices or warrants when appeals are preferred, can ever justify such flagrant breach of law and violation of constitutional rights. The constitutional oath to "uphold the constitution and the laws" should be a constant deterrent against devising procedure or ways that fly in the face of the constitutional guarantees and the mandate of the law.

11. Even the powers of the High Court under Article 227 of the Constitution to have superintendence over all courts and to make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts, which are also referred to in the provisions of Section 476 of the Code which provides for the forms, but subject to these powers, do not at all authorise the High Court to make any provision which is inconsistent with a provision of law for the time being in force, apart from the fact that any such rule or form would require the previous approval of the Governor as per the provisions of the proviso to Sub Article (3) of Article 227 of the Constitution. In fact, the constitutional provision mandates that the High Court shall not exercise its powers of superintendence including power of framing rules or regulations in derogation of any statutory provision.

12. It will also be significant to note that under Section 437(6) of the Code, it has been provided that if, in any case triable by a Magistrate, the trial of a person accused of a non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. In the same way there is another important provision contained in sub-section (7) of Section 437, which provides that if, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgement is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgement delivered. Thus, when the law has provided in these provisions for a statutory release of an accused tried by a Magistrate if the trial is not over in six months and even for release without surety in cases where the trial is concluded but

the judgement is not yet delivered and when the Court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, it would be a travesty of justice to insist on release of the person who has been found to be not guilty and acquitted, on his furnishing a bail bond. In our opinion therefore the mandatory provisions of Section 354(1)(d) must govern the field in all cases of acquittal and the accused who is acquitted is entitled to be set at liberty without any fetter of being asked to furnish a bail or bail-bond for his release and any contrary direction would be ex-facie without jurisdiction and void.

13. In the above view of the matter, we are unable to accept the contentions of the learned Additional Public Prosecutor. Neither Article 50 nor Articles 39A or 51A(i) & (j) referred to by the learned Additional Public Prosecutor can be pressed in service to bring about such startling results.

14. We therefore hold that no directions as were issued by a Division Bench in State of Gujarat V. H.L.Solanki, reported in 35(1) G.L.R page 581, could have been issued under Section 482 of the Code by the High Court to the subordinate Courts to the effect that when the acquittal orders were made, the accused should be required to furnish bail and bail bonds for securing their attendance before the appellate Court for a period of 12 months from the date of the order of acquittal or for any period whatsoever. In this view of the matter, we are constrained to over-rule the ratio of the decision in H.L.Solanki's case (supra). The necessary corollary of this decision would be that the conditions which have been imposed on in these three matters by the trial Courts requiring the acquitted petitioners be released only on their furnishing bail, are unconstitutional, illegal and void ab-initio and cannot therefore be sustained. No such conditions or fetters could have been imposed by the trial Court.

We therefore, allow these petitions and the impugned conditions which were imposed by the trial Court are hereby set aside. Bail bonds, if any, executed pursuant to the impugned conditions will stand cancelled. Rule is made absolute accordingly.

---

*/Mohandas